

Brexit and the Politics of Law-Making

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Since the House of Commons rejected the Brexit deal in the first meaningful vote in January 2019, a number of MPs have sought to take steps to legislate, against the government's wishes, to prevent the UK from leaving the EU without an agreement. On 8 April, these steps culminated with Parliament enacting the European Union (Withdrawal) (No. 5) Bill (the 'Cooper Bill'). The Cooper Bill has raised fundamental questions over the relationship between law and politics in the UK. The two which I will address here are: whether MPs should be able to legislate contrary to the wishes of the government of the day; and whether it is desirable to use legal means, as the Cooper Bill proposed, to shape the relationship between the Commons and the government.

What role should MPs play in the legislative process?

The role of MPs within the legislative process is conditioned by the fact that the government normally only introduces Bills which it knows will command the support of a majority of MPs. If government Bills were regularly defeated then it would call into question whether the government could continue to govern.

Since the Brexit deal was published in November 2018, the relationship between the government and the House of Commons has not functioned normally. The government has not been able to put forward proposals that reflect what the majority of MPs want. The decision of the Commons to approve the Cooper Bill showed that MPs outside the government could advance a proposal, on the major policy issue facing the country, which could command majority support despite the government's opposition. Some commentators have argued that those MPs behind the Cooper Bill acted improperly, in constitutional terms, by seeking to legislate against the government's wishes. However, if the government had followed existing constitutional practice, then once it became clear that a majority of MPs could be in favour of the substance of the provisions in the Cooper Bill, the government should have put forward its own version of the legislation to avoid defeat.

Should law be used to shape the political process?

One of the dominant features of the parliamentary debate over Brexit in the 2017 Parliament was the desire of a number of MPs to create a legislative framework to define the Commons' role in the Brexit process. In 2018, MPs put the government under pressure to create a legal framework to regulate the 'meaningful vote' (resulting in s 13 of the EU (Withdrawal) Act 2018). In 2019, MPs have focused their attention on legislating to require the government to request an extension to Article 50 (the Cooper Bill). Both are relatively unusual in domestic constitutional

terms for using legislation to direct government policy. Nevertheless, the ticking clock of Article 50 and the resulting instability arguably justify unorthodox constitutional solutions. The problem with legislating in this way is that it is very difficult to craft legislative solutions 'as you go'. Section 13's requirement that the government responds to the Commons rejection of the deal with a statement within 21 days illustrates the point.

Further, for some observers of the UK constitution, both s 13 of the EU (Withdrawal) Act 2018 and the Cooper Bill go against the grain of the UK's constitutional tradition, by seeking to provide legal answers to political problems. Proponents of the traditional view argue that legislative constraints on either the government's or the House of Commons' discretion are more likely to result in undesirable and unanticipated consequences than improved results. The role of the Fixed-term Parliaments Act 2011 during the Brexit process arguably provides further support for this position.

Foresight better than hindsight

It is tempting to conclude that had a bespoke framework to regulate the interaction between the Commons and the government over Brexit been in place at the outset, the process may have been less uncertain and fraught. Had the government anticipated MPs' desire to avoid leaving the EU without an agreement and sought to introduce legislative provisions that could lessen the chances of it happening, perhaps MPs may have been able to focus on finding a compromise on the substance of the Brexit agreements.

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